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Issue Date: 24 October 2005

CASE NO.: 2005-LHC-00213

OWCP NO.: 15-046785

In the matter of:

JOHN E. HUFFMAN,
Claimant,

vs.

BLACKWATER SECURITY CONSULTING, LLC,
Employer,

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/AIG WORLDSOURCE,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party In Interest.

COMPENSATION ORDER APPROVING STIPULATIONS AND DENYING SECTION 908(f) SPECIAL FUND RELIEF

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 23 U.S.C. § 901, *et seq.* (the "Act"), and the regulations promulgated thereunder. A hearing was scheduled before me on June 8, 2005 in San Francisco, California. Prior to the hearing, Claimant John E. Huffman ("Claimant") and Employer Blackwater Security Consulting L.L.C. ("Employer") settled their disputes concerning the nature and extent of Claimant's injury, and submitted stipulations and substantial evidence in support of the stipulated facts and agreed resolution between Claimant and Employer. Consequently, only issues concerning Claimant's average weekly wage ("AWW"), retained wage-earning capacity, and Special Fund relief under section 908(f) of the Act remained open for adjudication between Employer and the Director, Office of Workers Compensation Programs as represented by the Office of the Solicitor (the "Director").

Employer submitted exhibits ("EX") 1-10, with EX 9 being the deposition of independent medical examiner ("IME") Dr. von Rogov and EX 10 being the deposition of rehabilitation counselor John C. Drew. With no objections, they are hereby admitted into evidence. On August 1, 2005, Employer's counsel submitted its post-trial brief, which I have marked and admitted into evidence as Administrative Law Judge exhibit ("ALJX") 1. At the same time, the Solicitor for the Director submitted his post-hearing brief, which I have marked and admitted into evidence as ALJX 2, thereby closing the record.

Stipulations

Claimant and Employer submitted their proposed stipulations, which are marked as EX 6. Claimant and Employer agreed in these stipulations that: (1) Claimant, who was born on March 18, 1970, was employed as an armed security specialist by Employer in Pakistan pursuant to a contract for security services between Employer and the U.S. Government, (2) while riding as a passenger in a vehicle traveling over a rough road, Claimant was thrown against the roof of the vehicle when the vehicle hit a bump or hole in the road, (3) on or about March 21, 2003, Claimant, acting within the scope of his employment, injured his back, (4) this injury comes within the coverage of the Act, as extended by the Defense Base Act, and Employer's liability under said Act was provided by Insurance Company of the State of Pennsylvania through its claims administrator AIG WorldSource, (5) timely notice of injury and timely claim for compensation were given and filed in accordance with section 12 and section 13 of the Act, (6) Claimant's average weekly wage at the time of injury was $1,400, (7) Claimant has a retained wage earning capacity of $500, and (8) Claimant reached maximum medical improvement, with regard to his low back injury, on October 20, 2003.

Upon review of the record, there is substantial evidence supporting the foregoing Stipulations 1-8, and, accordingly, they are approved. EXs 1-10 and ALJXs 1.

Discussion

It is well established that proposed stipulations between an employer and claimant are not binding on the Director without his participation for determining Section 8(f) relief. If the administrative law judge adopts the proposed stipulations between the employer and the claimant in regards to a determination of Section 8(f) relief, the proposed stipulations must be supported by substantial evidence. 33 U.S.C.A. §§ 908(f). *See E.P. Paup Co. v. Director, OWCP,* 999 F.2d 1341) (9th Cir. 1993).

The Director here objects to the stipulated average weekly wage of $1,400.00, the stipulated retained wage earning capacity of $500 per week, and the availability of Special Fund relief under Section 908(f) of the Act, claiming that none of these three issues are supported by the evidence.

FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant worked for Employer as an armed security specialist in Pakistan pursuant to a contract for security services between Employer and the U.S. government. EX 1 at 4. On or

about March 21, 2003, Claimant injured his back while riding in a vehicle traveling over a rough road. The vehicle reportedly hit a large bump or hole in the road, throwing Claimant against the roof. *Id*. Claimant reported that he was "out for a few seconds" and was seen by medical personnel approximately 20 minutes later. EX 7 at 69. Claimant continued working until late March or early April, when he returned to the United States and saw his treating physician, Dr. George Lien, a neurosurgeon, on April 15, 2003 about his back pain. EX 8 at 97.

Dr. Lien previously had performed a right L5-S1 microdiscectomy on Claimant to treat a disc herniation on December 20, 2001. EX 8 at 99-100. After the surgery, Claimant reported being "perfect" and having "absolutely no leg or back pain" nor any other symptoms until his March 21, 2003 injury. EX 8 at 98. Dr. Lien confirmed after examining Claimant that objectively Claimant was doing "remarkably well" just one month after his December 2001 surgery. *Id.*

Claimant returned to see Dr. Lien on April 15, 2003, complaining of low back pain and left leg paresthesias following the previous month's injury. EX 1 at 4; EX 8 at 97. An MRI revealed disk desiccation and slight loss of disk height at the L5-S1 level. EX 8 at 94. Claimant received treatment, which included epidural steroid injections on April 23 and August 11, 2003, pain medication, and physical therapy, but did not return to work. EX 1 at 4-5; EX 7 at 79-80; EX 8 at 84-93. Dr. Lien diagnosed Claimant as having lumbar radiculopathy. EX 7 at 79-80; EX 8 at 84, 86-96.

On October 17, 2003, Dr. Lien issued a functional capacity evaluation report, which indicated permanent limitations to lifting 40 pounds occasionally and 20 pounds frequently. EX 8 at 84. Dr. Lien concluded that Claimant would reach maximum medical improvement and could return to work on a permanently restricted duty basis on October 20, 2003. He also concluded that Claimant had sustained a permanent partial impairment of 13 percent of the whole person based on *the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition*. *Id.* Dr. Lien concluded that Claimant should return to see him on a "prn," or as necessary, basis. *Id.* Claimant was evaluated by two IMEs, Dr. Lloyd Walwyn, M.D., and Dr. Peter von Rogov, M.D., an orthopedic surgeon. Dr. Walwyn saw Claimant on October 1, 2003, in the course of preparing for a hearing on the issues of temporary disability and medical treatment, and concluded that Claimant's back condition was permanent and stationary with permanent restrictions of 12 percent whole-person impairment. EX 7 at 80.

Dr. von Rogov examined Claimant on July 9, 2004 and prepared his IME report dated July 18, 2004. EX 7 at 69-83. At his deposition on dated June 3, 2005, Dr. von Rogov stated that an individual who had had a microdiscectomy would not be as structurally sound as one who still had a "healthy disk" in that place, due to the loss of shock-absorbing and motion capability. EX 9 at 10-11. He went on to say that he would advise a patient after such a surgery to avoid frequent bending or stooping, frequent lifting over 50 pounds, occasional lifting over 75 pounds from floor to shoulder, frequent lifting over shoulder level, or requiring twisting of the trunk. EX 9 at 11.

When asked how Claimant's disability increased after the March 21, 2003 injury, Dr. von Rogov stated that Claimant should now avoid repetitive bending or stooping, frequent lifting

over 35 pounds from floor to shoulder, occasional lifting over 50 pounds from floor to shoulder, repetitive lifting over shoulder level, and lifting requiring twisting of the trunk. EX 7 at 81; EX 9 at 13. Dr. von Rogov opined that Claimant was probably 30 to 40 percent worse as a result of the March 21, 2003 injury. EX 9 at 14. In his IME report of July 18, 2004, Dr. von Rogov opined that considering Claimant's post-2003 injury lifting restrictions, Claimant had "lost approximately 50 percent of his pre-injury capacity lift and lost approximately 50 percent of his pre-injury capacity to bend or stoop." EX 7 at 82.

Dr. von Rogov also opined that in terms of Claimant's future medical care, there should be:

"1) Two to three visits per year for two years to evaluate the progression of the back problem.

2) Physical therapy for periodic recurrence of the problem (approximately six sessions per year).

3) One to four tablets per day anti-inflammatory medication, ongoing.

4) It is possible that the problem might progress at which Mr. Huffman [Claimant] may require additional surgery about L5-S1, to be determined by treating and consulting physicians." EX 7 at 82.

Finally, Dr. von Rogov indicated that Claimant was at 8 percent impairment after the 2001 surgery. However, he developed a post-surgical radiculopathy, which raised his impairment by two percent, and had an additional compression fracture of a thoracic vertebral body, which added another 2 percent, leaving Claimant at a current 12 percent whole-person impairment. EX 9 at 15-17.

The Vocational Rehabilitation Reports

Employer's vocational rehabilitation expert, John Drew, prepared a vocational evaluation report for Claimant, including a labor market survey. In his report of February 25, 2004, Mr. Drew concluded that although Claimant is unable to return to his position in Pakistan due to its physically demanding nature, he is still employable in the local, national, and international labor markets. EX 4 at 50-51; EX 5 at 53-64.

Mr. Drew found a vast array of employment opportunities in a number of different fields for which Claimant appears to be qualified. Mr. Drew had a difficult time estimating Claimant's annual salary at his former job with Employer, since he worked an irregular schedule of 90-120 days on and 30 days off. EX 4 at 50. However, he calculated that Claimant earned approximately $107,700.00 per year when he worked for Employer. EX 4 at 50. Mr. Drew also commented that Claimant would earn a $104,000.00 annual salary if he worked a more typical, full-time, 2080 work hours per year, at the higher deployment rate of $400.00 per day. *Id.*

Average Weekly Wage

A claimant's average weekly wage must be determined under one of three alternative standards set forth in subsections 10(a), 10(b), and 10(c) of the Longshore Act. Subsection 10(a) applies when a claimant worked in the same employment for "substantially the whole of the

year" immediately preceding the injury. Subsection 10(b) applies when the claimant was not employed substantially the whole year preceding the injury, but there is evidence in the record of wages of a similarly situated employee who did work substantially the whole year. When subsection 10(b) applies, the similarly situated employee's average daily wage is used to calculate an average weekly wage in the same manner set forth in subsection 10(a). Subsection 10(c) applies when neither subsection 10(a) nor 10(b) can be reasonably or fairly applied.

As a general rule, workers with permanent and continuous jobs fall under subsections 10(a) and 10(b), while workers employed in seasonal and intermittent jobs fall under subsection 10(c). *See Duncanson-Harrelson Company v. Director, Office of Workers' Compensation Programs,* 686 F.2d 1336, 1341 (9th Cir. 1982), *vacated in part on other grounds* 462 U.S. 1101 (1983). *See also Palacios v. Campbell Industries*, 633 F.2d 840, 841-42 (9th Cir. 1980); *SGS Control Services v. Director, OWCP*, 86 F.3d 438 (5th Cir. 1996); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 822 (5th Cir. 1991). However, in *Matulic v. Director, OWCP*, 154 F.3d 1052 (9th Cir. 1998), the Ninth Circuit held that, notwithstanding the *Duncanson-Harrelson* decision, there is a "presumption" that subsection 10(a) should be applied unless its application would be "unreasonable or unfair" and that when a claimant has worked "more than 75 percent of the work days in the measuring year the presumption ... is not rebutted." 154 F.3d at 1057-58. In other words, it appears that the Ninth Circuit has concluded that even when an injured worker has been only intermittently or seasonally employed, there is nonetheless an irrebuttable presumption that subsection 10(a) must be applied if the worker has managed to find work on more than 75 percent of applicable number of work days (e.g., on more than 195 days in the case of a five-day worker and on more than 225 days in the case of a six-day worker).

When neither subsection 10(a) nor 10(b) can reasonably and fairly be applied, subsection 10(c) provides the general method for determining the appropriate average weekly wage. Under the express language of subsection 10(c), at least three factors must be given consideration: (1) the previous earnings of the claimant in the job in which he or she was working at the time of the injury, (2) the previous earnings of others engaged in similar employment, and (3) other employment of the injured employee, including self employment. In addition, the courts have held that since the underlying purpose of subsection 10(c) is to arrive at an accurate assessment of a claimant's actual earning capacity, it is also appropriate to consider other factors, such as an employee's "ability, willingness and opportunity to work." *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 757 (7th Cir. 1979); *Palacios v. Campbell Industries*, 633 F.2d 840, 843 (9th Cir. 1980).

It is not possible to calculate Claimant's average weekly wage under the provisions of subsection 10(a) because there is no evidence in the record that Claimant worked in any employment, whether for the same or another employer, during substantially the whole of the year immediately preceding the March 2003 injury. *See Duhagon v. Metropolitan Stevedore Company*, 169 F.3d 615, 618 (9th Cir. 1999); *Lobus v. ITO Corp. of Baltimore, Inc.*, 24 BRBS 137, 140 (1990). Stated differently, section 10(a) is inapplicable because there is no evidence that Claimant worked more than 75 percent of the days in the year prior to the March 21, 2003 injury. Nor is there sufficient evidence for the calculation of an average weekly wage under the provision of subsection 10(b). As a result, the average weekly wage calculation must be made under the provisions of subsection 10(c). Moreover, where the claimant’s employment is

seasonal, part-time, intermittent, or discontinuous or where there is insufficient evidence in the record to make a determination of average daily wage under either subsections (a) or (b), section 10(c) is appropriately applied. *Palacios v. Campbell Industries*, 633 F. 2d 840, 841-42 (9th Cir. 1980); *Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176 (9th Cir. 1976).

The Director argues that Claimant's AWW should be less that $1,400 because, among other things, tax returns show that "Claimant reported $7,333 in 2000 and reported business losses in 2000 and 2002." ALJX 2 at 3. Because there are no tax returns submitted or admitted into the record, I cannot give this argument any weight. The Director further argues that "Claimant's contract with the Employer indicates that the Claimant was paid $8,700 for work performed from February 15, 2003 through April 19, 2003." *Id.* Once again, because there was no contract or any other documentary evidence submitted by the Director save his closing brief, I cannot properly rely on this argument.

Instead, Employer's vocational rehabilitation expert Mr. Drew reviewed Claimant's salary information and found that Claimant received $17,950 in wages for work between February 15, 2003 and April 19, 2003, which are the same dates used by the Director. EX 4 at 50. Even if there were evidence to support the Director's allegations regarding Claimant's lower earnings in prior years, I am disregarding Claimant's previous earnings in determining his earning capacity and resulting AWW for purposes of section 10(c). "The term 'earning capacity' connotes the potential of the injured employee to earn and is not restricted to a determination based on previous actual earnings." *Bonner v. National Steel & Shipbuilding Co*., 5 BRBS 290, 293 (BRB)(1977) (emphasis in original) (citing *Barber v. Tri-State Terminals, Inc*., 3 BRBS 244 (BRB)(1976)). Even though Claimant had only worked a short time at these wages as a Security Specialist for Employer, I calculate his AWW to reflect his "good fortune" in obtaining a higher paying job with Employer. *See Harrison v. Todd Pacific Shipyards Corp*., 21 BRBS 339, 345 (BRB)(1988)(although claimant had only worked a short time, at higher wages, with the employer, his AWW was calculated to reflect his "good fortune" in obtaining a higher paying job with the employer); *Bonner, supra*.

As referenced above, Mr. Drew had a difficult time estimating Claimant's annual salary at his former job with Employer, since he worked an irregular schedule of 90-120 days on and 30 days off. EX 4 at 50. However, he calculated that Claimant would earn approximately $107,700.00 per year despite not working full-time or continuously for an entire year due to his schedule of working 90-120 days on and 30 days off. *Id*. Mr. Drew extrapolated an alternative yearly wage by opining that even if Claimant had worked a typical, full-time, 2080 work hours per year, at the higher deployment rate of $400 per day, this would equal $104,000 annual salary. *Id*.

I reject both of Mr. Drew's estimates for Claimant's annual wages based on his actual earnings of $17,950.00 for slightly more than two months of work. First, the $107,700 figure is simply the $17,950 multiplied by six, apparently representing 12 months of wages. This completely ignores the fact that had Claimant continued his work with Employer, he would have had 30 days off every 90-120 days. There is no evidence presented that Claimant could expect to be paid any wages during this down time, which over a year could be as much as 90 days (90 days deployed + 30 days off + 90 days deployed + 30 days off + 90 days deployed + 30 days off

= 360 days, or one year). Similarly, Mr. Drew's $104,000 annual wage estimate also ignores the 90 days of down time and thus is also rejected.

I find that a more appropriate estimate of Claimant's yearly wage working as a Security Specialist for Employer must properly take into consideration Claimant's unpaid downtime and the fact that Claimant was paid $150 per day for his travel days and $400 per day for his actual deployment.[1] *See* EX 4 at 23. The evidence further shows that Claimant traveled 15 days and was deployed 36 days after training was complete. EX 4 at 23.[2] Over a year's time with three 90-day stints for Employer, I estimate that Claimant would be paid $11,850 for 79 travel days at $150 per travel day. In addition, Claimant could reasonably expect to receive further wages of $76,400 for 191 actual deployment days at $400 per deployment day. As a result, I calculate Claimant's reasonable average annual earnings to be $88,250, the total of the $11,850 travel wages and the $76,400 deployment wages.

By dividing Claimant's average annual earnings of $88,250 by 52 as required by section 10(d), I arrive at an upper limit AWW for Claimant of $1,697.12. I note that this calculation exceeds the stipulated AWW of $1,400.00 between Claimant and Employer. I adopt the lower stipulated AWW of $1,400.00, however, giving weight to Claimant's own agreement that the lower AWW is acceptable and taking further notice that some discount factor is reasonable since the employment contracts were for 90-120 day periods and there was no guaranty that they would actually be renewed for a year's time. Claimant and Employer would seem to be in the best position to determine the likelihood of Claimant position of Security Specialist lasting up to a year or more.

For these reasons, I find that there is substantial evidence to support Claimant's stipulated AWW of $1,400.00.

Claimant's Retained Wage-Earning Capacity

It is undisputed and I further find that as of October 20, 2003, Claimant was unable to perform his usual job duties as an armed security specialist due to his March 21, 2003 work-related injury. Accordingly, I conclude that Claimant is entitled to a presumption of temporary total disability beginning October 20, 2003, when he reached maximum medical improvement. EX 8 at 84.

To rebut the presumption of total disability, the employer must present evidence of suitable alternate employment that claimant is capable of performing. *See New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 1038 (5th Cir. 1981). To meet this burden, the employer must show the availability of job opportunities within the geographical area in which the claimant resides, which he can perform given his age, education, work experience and physical restrictions, and for which the claimant can compete. *Id.* at 1042-43; *Bumble Bee*

[1] I am assuming that Claimant's period of five training days at the start of his work with Employer was non-recurring and is not a part of my estimate. see EX 4 at 23.

[2] I use the ratio of travel days to total non-training days worked 15/51 or 29.41 percent and the ratio of deployment days to total non-training days worked 36/51 or 70.59 percent to extrapolate the rounded total travel and deployment days worked over a year's time with 90 off days.

Seafoods, 629 F.2d at 1330; *Hansen v. Container Stevedoring Co.,* 31 BRBS 155, 159 n.5 (1997). In determining this issue, I may rely on the testimony of vocational counselors that specific job openings exist to establish the existence of suitable employment. *See Turney v. Bethlehem Steel Corp.,* 17 BRBS 232 (1985). The counselors must identify specific available jobs; labor market surveys are not enough to establish suitable alternate employment. *See Campbell v. Lykes Bros. Steamship Co.,* 15 BRBS 380 (1983).

As referenced above, Claimant and Employer stipulated that Claimant has a retained wage earning capacity of $500 per week. Because I am denying section 8(f) Special Fund relief, as referenced below, Employer's stated agreement that Claimant's retained wage earning capacity is $500 per week is given greater weight than otherwise. Employer's vocational rehabilitation expert, Mr. Drew, stated that Claimant did sustain a loss of wage earning capacity, but his loss varies greatly depending on the labor market. EX 5 at 64. He opined, however, that two viable positions for Claimant within his local geographic region were Auto Claims Processor and Auto Claims Representative, with starting annual salaries of $22,194 and $30,000, respectively. EX 5 at 54-55. These two annual salaries average out at approximately $26,000, providing substantial evidence in support of Claimant's stipulated retained wage-earning capacity of $500 per week ($26,000/52).

For these reasons, I find that there is substantial evidence to support the stipulated $500.00 per week being Claimant's reasonable retained wage-earning capacity.

In this case, I find that Claimant is entitled to receive two-thirds of the difference between his average weekly wage of $1,400.00 and his post-injury earning capacity of $500 per week, for a compensation rate of *$600.00 per week from October 20, 2003 through the present* and continuing as his unscheduled permanent partial disability benefits.

Section 8(f) Relief

Section 8(f) shifts the liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§ 908(f), 944. An employer may be granted Special Fund relief in a case where the claimant is permanently partially disabled, if it establishes that a) the claimant had a pre-existing permanent partial injury; b) the pre-existing permanent partial injury was manifest to the employer; and c) the claimant's current disability is not due solely to the subsequent work injury and "is materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §§ 908(f)(1); *Marine Power & Equipment v. Department of Labor (Quan),* 203 F.3d 664 (9th Cir. 2000); *Sproull v. Director, OWCP*, 86 F.3d 895 (9th Cir. 1996), *Two "R" Drilling Co., Inc. v. Director, OWCP,* 894 F.2d 748 (5th Cir. 1990); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503 (D.C. Cir. 1977). If the employer fails to establish any of these elements, it is not entitled to section 8(f) relief. *Marine Power & Equipment v. Department of Labor (Quan)*, 203 F.3d 664, 668 (9th Cir. 2000); *Seattle v. Lane Construction Corp.,* 15 BRBS 148 (1982).

The employer bears the burden of establishing that the criteria for Section 8(f) relief have been met. In order to prove the material contribution requirement, an employer can submit "medical evidence or otherwise." *Sproull v. Director, OWCP*, 86 F.3d 895, 900 (9th Cir. 1996); *Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP, (Harcum II),* 131 F.3d 1079, 1081-1082 (4th Cir. 1997) (vocational rehabilitation expert can prove materiality prong of the contribution requirement). I have discretion to accept or reject all or any part of the presented medical or vocational evidence. As the trier of fact, I am not bound to accept the opinion or theory of any particular medical examiner. *See Todd Shipyards Corp. v. Donovan,* 300 F.2d 741 (5th Cir. 1962). If the disability is partial as is the case here, the medical evidence must explain (1) why the disability is not due solely to the second injury, and (2) why the disability is materially and substantially greater than that which would have resulted from the subsequent injury alone. 33 U.S.C. § 908(f). In addition to demonstrating that Claimant had a pre-existing permanent disability, Employer here must quantify what Claimant's disability would have been from the second injury alone to show that the pre-existing injury contributed to a materially and substantially greater disability. *Director, OWCP v. Newport News Shipbuilding and Dry Dock Co. (Carmines),* 138 F.3d 134, 139 (4th Cir. 1998).

1. *Claimant Had a Permanent Partial Pre-existing Disability*

The first of the three requirements for obtaining section 8(f) relief is a showing by the employer that the claimant had a pre-existing permanent partial disability. However, the pre-existing disability does not need to be economically disabling or require medical treatment in order to constitute a permanent partial disability within the meaning of section 8(f). The Ninth Circuit has adopted the "cautious employer" test as one means of demonstrating a claimant's pre-existing permanent partial disability. *Lockheed Shipbuilding v. Director, OWCP,* 951 F.2d 1143, 1145 (9th Cir. 1991); *Todd Pac Shipyards v. Director, OWCP,* 913 F.2d 1426, 1430 (9th Cir. 1991). This test is satisfied if the employee had such a serious disability that a cautious employer would have been motivated to discharge the employee because of a greatly increased risk of employment-related accident and compensation liability. *C&P Telephone Co.,* 564 F.2d at 512. It is sufficient to show that the increased risk of compensation liability to the employer would motivate a cautious employer to discharge or refrain from hiring the employee due to his or her pre-existing disability. *Id*. at 513.

In this case, the Director has conceded that this first requirement has been met, due to the fact that Claimant had a lumbar laminectomy on December 20, 2001. ALJX 2 at 2; EX 2 at 9. Claimant's post-surgical low back condition gave Employer a reasonable basis to be concerned with the increased risk of injury and compensation liability. Accordingly, I find that the first requirement for section 8(f) relief has been met.

2. *Claimant's Pre-existing Permanent Partial Disability Was Manifest to Employer*

In *Director, OWCP v. Cargill,* 709 F.2d 616 (9th Cir. 1983), the Ninth Circuit overruled its prior holding in *Director, OWCP v. Campbell Indus., supra,* at 678 F.2d at 840 stating that the prior contributing condition [or injury] must be manifest to the employer at the time that the employee began work. The court in *Cargill* held that it was sufficient for the pre-existing disability to be manifest to the employer prior to the last injury. 709 F.2d at 619. The pre-

existing disability is considered to be manifest if the employer had constructive knowledge of this condition, in the form of medical records, documenting the existence of such condition prior to the work injury. *Id*. Claimant's pre-existing low back condition was manifest to Employer through medical records, and Employer had constructive, if not actual, knowledge of the condition prior to the last injury. ALJX 2 at 2.

3. *Claimant's Pre-existing Permanent Partial Disability Did Not Contribute to a Materially and Substantially Greater Disability Than That Which Would Have Resulted From the Subsequent Injury Alone*

When an ultimate permanent disability is only partial as in this case, the employer must establish that the current disability is materially and substantially greater than the disability that would have resulted from the subsequent injury alone. 20 C.F.R. §702.321(a)(1). In order to determine whether this requirement has been satisfied, a fact finder must consider what level of disability would have resulted from a claimant's work-related injury if the claimant had not already had a pre-existing disability at the time of the injury. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.,* 8 F.3d 175, 185 (4th Cir. 1993).

In this case, Claimant had a pre-existing permanent partial disability, so Employer must meet the material contribution requirement by showing that Claimant's pre-existing injury has contributed to a materially and substantially greater disability than that which would have resulted from only the subsequent injury. 33 U.S.C. § 908(f)(1). An employer can show this by submitting medical or vocational evidence quantifying the type and extent of the claimant's disability from the second injury alone. *Harcum I,* 8 F.3d at 184.

The Director asserts that the Employer failed to quantify Claimant's disability resulting solely from the second injury. Dr. von Rogov's report, dated July 18, 2004, indicated that after Claimant's lumbar surgery in 2001, he had sustained an 8 percent whole person impairment based on *the AMA Guides to the Evaluation of Permanent Impairment*. EX 7 at 82-83. Following the March 21, 2003 injury, Claimant's whole-person impairment increased by 4 percent, resulting in an ultimate 12 percent whole-person impairment. *Id*. However, to establish entitlement to Special Fund relief, it is not enough simply to calculate the current disability and then subtract the disability that resulted from the pre-existing injury. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Carmines),* 138 F.3d 134 (4th Cir. 1998). Although Employer quantifies the increase in impairment, it is unknown whether this last injury could potentially have resulted in a 12 percent whole-person impairment on its own, without the pre-existing condition. Dr. von Rogov failed to opine about the extent of Claimant's disability caused solely by the March 21, 2003 injury. Moreover, Mr. Drew failed to provide evidence that Claimant would have suffered a loss of earning capacity from the 2003 injury alone. Mr. Drew did not feel that Claimant would sustain a great wage loss, particularly if he went to work in sales or for the U.S. Army or Department of Defense.

Although Claimant's pre-existing low back condition likely contributed somewhat to his current state of impairment, the evidence does not show that it made his current disability materially and substantially greater than that which would have occurred from the second injury alone. Taking into account the vocational and medical evidence, I find that Employer has not

met its burden of quantifying the type and extent of Claimant's injury from the second injury alone.

ORDER

Based on the foregoing findings of fact and conclusions of law, **IT IS HEREBY ORDERED** that:

1. Employer shall pay Claimant compensation for temporary total disability for the period from March 21, 2003 to October 19, 2003 at a compensation rate of $933.33 per week ($1,400 x 2/3).

2. Employer shall pay to Claimant permanent partial disability benefits, calculated as two-thirds of Claimant's average weekly wage of $1,400 less his post-injury earning capacity of $500 per week for a compensation rate of $600 per week, from October 20, 2003 through the present and continuing.

3. Employer shall provide such future medical care as may be reasonable and necessary for the treatment of the injuries to Claimant's back. as a result of the March 21, 2003 injury.

4. Employer shall receive a credit for previous disability benefits paid to Claimant.

5. Employer shall pay interest on each unpaid installment of compensation from the date the compensation became due until the date of actual payment at the rates prescribed under the provisions of 28 U.S.C. 1961.

6. The District Director shall make all calculations necessary to carry out this order.

7. Counsel for Claimant shall within 20 days after service of this Order submit a fully supported application for unpaid costs and attorney fees to counsel for Employer and to the undersigned Administrative Law Judge. Within 20 days thereafter, counsel for Employer shall provide Claimant's counsel and the undersigned Administrative Law Judge with a written list specifically describing each and every objection to the proposed fees and costs. Within 15 days after receipt of such objections, Claimant's counsel shall verbally discuss each of the objections with counsel for Employer. If the two counsel disagree on any of the proposed fees or costs, Claimant's counsel shall within 10 days file a fully documented petition listing those fees and costs which are still in dispute and set forth a statement of Claimant's position regarding such fees and costs. Such petition shall also specifically identify those fees and costs which have not been disputed by counsel for Employer. Counsel for Employer shall have 10 days from the date of service of such application in which to respond. No reply will be permitted unless specifically authorized in advance.

A

GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California